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THE EVOLUTION OF PROBATION IN AMERICAN LAW*

CHARLES W. WEBSTER**

PROBATION as a force in the administration of criminal law cannot be lightly regarded. As the Wickersham Commission pointed out, "Probation must be considered as the most important step we have taken in the individualization of the treatment of the offender," and that "no man should be sent to a penal institution until it is definitely determined that he is not a fit person for probation."¹ In light, therefore, of the importance of probation, a study of the historical development of probation and a consideration of its future development seems in order.

Before we consider the development of probation it may be well to consider what is meant by probation. Professor Sheldon Glueck of Harvard Law School, in answering this question, stated:²

"What is probation? In any but a most superficial sense, this crime-treatment instrumentality consists of at least three indispensable elements: 1) The suspension, under conditions and for a period imposed by the court, of the imposition or execution of a sentence on a person convicted of a crime, and his retention in the community instead of a prison; 2) the taking of such action only after study by the judge of a carefully prepared report that embodies the findings of an investigation into the offender's make-up and career; 3) and the resulting placement of the probationer under the careful supervision of an adequately trained probation officer."³

With this in mind, we should also consider the purpose of probation. Probation is not, and should not be considered, as a form of punishment different in nature, though not in substance, from incarceration. In *Belden v. Hugo* the court in this regard pointed out that:

"Probation is not ordered for the purpose of punishment for the wrong for which there has been a conviction, or for a general wrongdoing. Its aim is reformatory, and not punitive. It is to bring one who has fallen into evil ways, under oversight and influences which may lead him to a better living. The end sight is the good of the individual wrong-doer, and not his punishment."⁴

*This is a condensation of a speech delivered before the State Probation officers at the Golden Jubilee of the Establishment of Probation in N. Y. State held in Niagara Falls, N. Y., Oct. 16, 1951.

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1. National Commission on Law Observance and Enforcement, 1931.

2. Probation and Criminal Justice, edited by Professor Sheldon Glueck.

3. Probation should not be confused with parole. Parole comes after sentence has been imposed and a period of imprisonment served. See Probation & Parole, published by National Probation Association.

4. 88 Conn. 500, 91 Atl. 369 (1914).

What is the function of probation in Criminal Law administration? Probation must not be considered as an end in itself, but rather as a means toward an end. "The major problems of the criminal law are two: what behavior should be made criminal, and what should be done with persons who commit crimes."⁵ Since probation is merely a means used in an attempt to deal with the problems of crime it seems fitting that we first deal with this question: What is the dominant purpose of the criminal law? Until we determine this we will be unable to see in what direction any underlying philosophy of probation is leading us. Mr. Justice Black in *Williams v. State of New York*,⁶ stated that:

"Retribution is no longer the dominant purpose of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."⁷

Historians tell us that the first philosophy of punishment was based upon the theory of retribution or retaliation. The *lex talionis* of an "eye for an eye and a tooth for a tooth" was the ruling philosophy. The pound of flesh was literally demanded from the individual in expiation for his crimes.⁸ In the middle ages the theory of deterrence as the dominant philosophy behind punishment arose. The position was taken that to punish a man solely because he had inflicted pain, as was advocated at the time by the utilitarian school, was immoral, and the only justification for punishment must be based on the principle that the treatment of an individual operated as an example for the rest of society; and that the purpose therefore of inflicting punishment was not to force the culprit to suffer for his crimes, but rather that his punishment set an example which would deter others from crime.

In the 19th century this theory of punishment was partially displaced as we began to feel that our approach was wrong, and that the only justification for incarceration was the attempt to reform the errant one and return him to his rightful place in society. This shift in emphasis from a philosophy of deterrence which was interested, not in the individual offender, but rather on the deterrent effect his punishment had on the rest of society, to an emphasis on the individual, forced society to reexamine its basic beliefs on what steps should be taken in order to reform the delinquents in its midst.⁹

5. Criminal Law and Its Administration, by Jerome Michael and Herbert Wechsler, p. 8.

6. 337 U. S. 241 (1948).

7. *Id.* at p. 248.

8. Retribution has not completely disappeared, by any means, from the mind of society as the rationale for punishment.

9. This is not intended as a general discussion of the various theories of punishment. For an excellent discussion see Michael & Wechsler, *supra*, n. 5 at p. 4-20.

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With this background in mind, let us consider the beginnings of the system of probation as we now know it. Since probation is a by-product of the suspended sentence, it seems advisable to look back in history at the various attempts of judges and the law to provide some form of leniency whereby the offender was not placed within the confines of a penal institution. From very early times, the courts have attempted to establish some form of individualization in the criminal law. Some of the early devices were:

"(a) *Benefit of Clergy* was a device by which certain persons escaped the severe punishments of the English common law. In the beginning of the thirteenth century only ordained clerks, monks, and nuns could obtain this privilege and be delivered to the church courts for punishment. Later this privilege was gradually extended to others who were not ordained, and then to all who could read a test verse, the first of Psalm 51, beginning 'Have mercy upon me.' Benefit of clergy may be classed as a jurisdictional adjustment or as an early form of suspended sentence.

(b) *Judicial reprieve* represents the discretionary powers of the presiding judge in a trial if the judge is not satisfied with the verdict, the evidence is suspicious, the indictment is insufficient, the offense is a small felony, or any favourable circumstances appear in the criminal's character. The reprieve was only temporary.

(c) *Right of sanctuary* gave one accused of a felony immunity from arrest in a church or other place chartered as a sanctuary. This practice was abandoned in England in 1623 for crime, but still held for civil processes until 1697 and 1723. While this is a far cry from probation as we understand it, it is a crude form of reprieve or stay of punishment."¹⁰

In the early days of American jurisprudence, on the basis of the above precedents, many courts held that they had the inherent power to suspend the sentence of a criminal before them. In *People v. Court of Special Session*,¹¹ the Court of Appeals for this state held that it was the inherent power of the courts of the state to suspend sentence and that this was part of our heritage from the English common law. While New York and other states so held, many other jurisdictions took the position that there was no such inherent power in the courts;¹² that this power to suspend sentence was a usurpation of the power to pardon, which rested in the executive.

10. Frank W. Grinnel, *The Common Law History of Probation*, 32 J. of Crim. Law and Criminology 15.

11. 141 N. Y. 288 (1894).

12. John B. Waite, "The Prevention of Repeated Crimes." Michigan Legal Studies. A collection of the statutory authorities for suspension of sentence is found in Waite, appendix A, p. 96.

In the famous *Killits*¹³ case the United States Supreme Court held that the Federal District Courts had no such power. This decision upset the practices of the various district judges, and it is estimated that there were over 5000 men serving on suspended sentences at the time this decision was made.¹⁴ It might be pointed out that while the decision was of doubtful validity, it did have the very salutary effect of forcing Congress to enact a Federal Probation Law, in which, up to this time, it had shown very little interest.

The term probation was first used by John Augustus, who is generally credited with the introduction of the practice as well as the word.¹⁵ John Augustus was a Boston shoemaker, a skilled craftsman, who spent much of his time around the courts of Boston befriending people who were in jail because they could not pay their fines. It is said that "by 1858 he had bailed out 1,152 men and 794 women and girls."¹⁶ Massachusetts was the leader in legislation in this field, having enacted in 1878 the first law appointing a probation officer. It was no accident that Massachusetts was the vanguard. The critics of John Augustus, who had ridiculed his actions, finally saw that his system worked and had possibilities. There can be little doubt that the convincing factor in probation was its economy.

Probation did not, however, spread like wildfire across the nation; its progress was slow. In 1900 only six states had enacted such a law, and it was not until 1901 that New York first enacted a probation law.¹⁷ In fact, even at this late date some states still have not established such a system. These are mainly, however, states which are rural in nature, in which the problem is not so pressing as in more highly urbanized states.

The twentieth century saw new impetus given to the attempts at rehabilitation and emphasis on the use of probation as a means toward effecting that end. The greater use of the suspended sentence as a means of ameliorating the severity of a mechanical criminal code and as an attempt to give the offender another chance, is understandable in a democratic society, and may be found in many facets of our development.

The reasons for the development of probation have never been adequately explored. Why probation should have had its inception in the United States

13. *Ex Parte United States*, 242 U. S. 17 (1916).

14. The Common Law History of Probation, *supra* n. 10. The President thereafter pardoned these men—one of the largest wholesale acts of clemency in our history.

15. Barnes & Teeters, *New Horizons in Criminology* at 374.

16. John Augustus, *First Probation Officer*, National Probation Association, 1939, p. vi.

17. Probation and Criminal Justice, *supra*, n. 2 at p. 227.

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rather than in England¹⁸ or the civil law countries may have some significance.¹⁹ Without attempting to verify these conclusions, a few observations may seem in order to suggest possible reasons for this development.

In the 19th Century this nation was made up largely of immigrants, to many of whom America represented an opportunity for a second chance. In these adventurous people, there was characteristically, a recognition that a single failure did not necessarily connote a complete failure. There may be some significance in the fact that one of the first types of legislation enacted by the people of the United States in the 19th century was a bankruptcy law. While this is by no means any sort of conclusive evidence, it does suggest that the attitude of this society toward the debtor may have a larger significance. What better recognition can we point to, than the fact that the people, from whom all laws in a democracy must ultimately come, felt that here in America, a man should be given a second chance? If society was willing to forgive its debtors, what was more reasonable than to expect that it was also ready and willing to look for a means of forgiving its sinners? To me these things may be joined together, for we cannot forget that many Americans had come from countries in which punishment for debt was carried out. The stigma of prison was placed on the debtor as well as on the transgressor.

While society's acceptance of the suspended sentence, and the philosophy of giving the individual another chance—of giving him a break—is probably explainable by the nature of the society which made up America, the sudden development of probation as a means of effectuating this end can not be explained on this basis. As we have seen, while the first probation law was enacted in 1878, it was not until the 20th century that great strides were made. By this, I mean that the people, through their legislatures, were not willing to accept the true spirit of probation until the 20th century.²⁰ What was taking place in the world in this era to give rise to an acceptance of probation?

The end of the 19th century and the beginning of the 20th century saw the birth of the modern social scientist. Prior to the late 19th century social science as such did not exist in this country. However, under the influence of Freud, John Dewey, William James and others, there developed a concerted drive to examine truths in the light of their effect upon conduct, and we find emerging from this,

18. Radzinowicz & Turner, "The Modern Approach to Criminal Law."

19. My colleague, Dr. Arthur Lenhoff, points to Probation as one of the contributions of the American Legal System to the law of the European countries. Lenhoff, *Legal Inventions Adopted in Other Countries*, 1 Bflo. L. Rev. 118, 130.

20. The slowness in the growth of Probation is of course partially explainable by the lack of effective communication of ideas among persons interested in the administration of criminal Justice.

people who developed a particular competence in a specialized field. Regardless of one's opinions concerning the philosophy of pragmatism it can hardly be denied that the pragmatist by his direct attack upon many social evils brought about the reforms of the early 20th century.

In this era which saw the development of specialization and a scientific reexamination of principles which had long been assumed to be true, what was the state of the nation? This was a period of unrest in the United States. From the attacks of William Lloyd and Lincoln Steffens on the corruptness of our cities, to the early attempts of labor and the farmer to attain some position in the society, it seems evident that the nation was engaged in a search for means to improve social conditions, to dignify the individual and give him greater strength in his constant battle with the Goliaths of industry and the law. This era saw the enactment of the Sherman and Clayton Anti-trust Acts, and the first effective legislation governing minimum wages, maximum hours and workmen's compensation. The late 19th and early 20th century was not an era of complacency, it was an era of dissatisfaction with the social scheme and an eagerness to accept changes when leaders pointed the way.

With society willing to accept changes, and the development of social scientists who were looking into the causes of crime, is it not understandable that the probation movement as a scientific means of rehabilitation should gather force in this, the first part of the 20th century?

It is beyond the scope of this paper to deal with judicial control of probation²¹ or to trace its development up to the present day. However it may be important to inquire as to its effects. Has probation been successful? In my opinion, the answer is an unqualified yes. How successful I do not know.²² There are so many intangibles involved that there is undoubtedly considerable variance in the results compiled by different statisticians.

In conclusion, it seems to me there are certain areas in which probation should move, certain areas in which probation is weak and finally I would like to utter a word of caution, not toward probation as such, but rather the danger of placing too great an emphasis on the social science point of view in dealing with the criminal. By this I mean that we may be encroaching on the basic liberties which we hold dear, in the interests of rehabilitation. Our changing concepts of punishment, our dealing with it as a means of rehabilitation, may cause us to turn to a social concept of crime.

21. For a discussion of the legal problems inherent in Probation, *see* Probation & Criminal Justice, *supra*, n. 2 at p. 23.

22. Compare, "500 Criminal Careers," by Sheldon and Eleanor Glueck, with Cooley, "Probation and Criminal Justice."

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One of the areas in which additional work can be done is in the field of Youth Correction. New York law provides that youths from 16 to 18, who are charged with felonies may upon recommendation of the District Attorney or the Grand Jury, be tried as Youthful Offenders. In addition the Judge on his own motion may determine that the youth should be so treated. It seems that there would be considerable justification in proving that before it is determined that a youth shall not be tried as a Youthful Offender a probation report should be rendered, so that the decision is made on the basis of the best of information.²³ If there is a value in the Youth Correction Program it is that we attempt to work with people who are still in the formative stages in their lives and who need assistance—and it is quite unrealistic to approach the question of who is entitled to this socialized treatment on the basis of the crime committed rather than the individual personality of the delinquent.

Another area into which probation might move is in relation to the indigent persons who become enmeshed in the hands of the law. Probation is recognized as a means of dealing with persons who have committed crimes, but are considered good risks to release in the custody of probation officers without previous commitment to one of our penal institutions, with its resultant stigma. But let us look at the situation as it exists today. If a person is arrested for a crime and can put up bail, he is released until the time of the trial. If he is found guilty, and the court decides he is a fit person to be placed on probation, he is released in the custody of probation officers. This man has not been removed from his neighborhood, he has not missed any work, and he has not been sitting in jail awaiting trial.

However, an indigent person arrested for the same crime may be held in jail for a period of three or four months until his trial is scheduled. Isn't this helping to defeat one of the primary aims of probation? Isn't the stigma of a county jail as bad as the stigma of any other penal institution? Aren't the bad associations forced upon the prisoners in a county jail as harmful as associations with third and fourth offenders in the state institutions? Should not the persons who are interested in the rehabilitation of men who have committed crimes but are corrigible, work for some means whereby these men are not confined while awaiting trial? It seems somewhat illogical that a man who is considered fit for probation after he is found guilty, should have been confined for four or five months before this determination is made.²⁴

23. It has been suggested that the original jurisdiction should be in the childrens' court and if there is a determination that the youth is not fit for treatment as a youthful offender, he should then be turned over to the District Attorney for prosecution as a felon.

24. There are, of course, some men placed on probation because of recognition that they have already served some time prior to trial.

It is submitted that it might be possible to have a probation investigation carried out on all persons confined due to an inability to raise bail in order to determine whether or not they could be released while awaiting trial. Whether this plan or a different one might be feasible, it is impossible to determine without investigation but it is an area in which much can be done—an area in which the very theory of probation is often destroyed before the forces of law get around to allowing probation to operate.

Ultimately the success of the investigatory part of the probation system rests in the hands of the judiciary; while many of the judiciary have made a determined effort to understand the philosophy of probation²⁵ there has been some feeling that part of the weakness of a probation system rests in a failure of the judiciary to be thoroughly grounded in the purposes of probation.²⁶ The blame for this weakness, however, cannot be placed entirely upon the judiciary by any means. As Judge Jonathan G. Goldstein once said:

"Bearing in mind that the law student without social vision becomes the attorney and judge without social vision, we should see to it that he is trained to deal with social service problems connected with the administration of the law, while yet in law school."²⁷

Fortunately, by and large the Law Schools are beginning to recognize their responsibility in this area and are placing a much greater emphasis on the problem of treatment of the delinquent and attempting to equip the embryo lawyer and judge with some concept of the social forces which enter into the administration of law. It is necessary, however, that this be kept constantly in mind in formulating any program of development in legal education.

CONCLUSION

The probation officer as an arm of the court exerts a tremendous influence in the administration of criminal law. Probation and the indeterminate sentence have resulted in a great increase in the discretionary powers exercised in fixing punishments. With this increase in discretion there has also developed a greater responsibility upon the part of the probation officers and other social scientists. To date this responsibility has been recognized and carried out, as Justice Black pointed out:²⁸

25. See: *The Trial Judge's Dilemma*, by Judge Joseph N. Ulman—*Probation & Criminal Justice*, *supra*, n. 2 at p. 109.

26. *Proceedings of the Governor's Conference on Crime, The Criminal and Society*, State of New York, p. 1008 et seq.—also, *Probation & Criminal Justice*, *supra*, n. 2 at p. 19, 104.

27. *Supra*, n. 26 at p. 1010.

28. *Williams v. New York*, 337 U. S. 241, 249.

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"In general these modern changes have not resulted in making the lot of the offender harder. On the contrary a strong motivating force for the change has been the belief that by careful study of the lives and personalities of convicted offenders, many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified."

In discussing the value of the probation officer he continued:

"Under the practice of individualizing punishment, investigational techniques have been given an important role. Probation officers making reports of their investigations have not been trained to prosecute, but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best information available rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation."

With this there can be no disagreement. But with this shifting of responsibility for the determination of punishment from the judiciary to the social scientist, a word of caution seems in order.

The influence of the probation officer upon the court, and the relation of the social scientist to the law, forces a consideration of the problem from the point of view of a legalist. Recognizing the value and the importance of the social scientist in the administration of criminal law, nevertheless the following danger should be pointed out lest in our haste to arrive at reformation, we neglect to consider the practical difficulties with which we are faced.

In recent years we have seen the indeterminate sentence, which was originally developed as a means of ameliorating the harshness of the determinate sentence, being used as a vehicle whereby persons may be confined for the rest of their natural lives upon the determination of the social scientists that they are not fit to return to their rightful places in society. If this philosophy continues, may we some day see the time when a man can be sentenced and serve for the rest of his life, for the theft of the proverbial loaf of bread?

The indeterminate sentence was developed as a means of individualizing treatment and as a means of destroying the retributive principle of punishment. However, until such a time as society is willing to provide sufficient funds so that there are enough psychologists, psychiatrists and social workers available to provide for individualized treatment, this new use of the indeterminate sentence is rather a return to, than a retreat from, the Code of Hammurabi.